Appendix A

United States Court of Appeals
for the Ninth Circuit

WING WA LEE, *Petitioner,* vs. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 21,060

[March 28, 1967]

Petition for Review of an Order of the
Immigration and Naturalization Service

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges

BARNES, Circuit Judge:

Petitioner Wing Wa Lee is a native and citizen of China, born in Shanghai. Apparently having fled from the Communist conquest of mainland China, he lived in Hong Kong from 1948 to 1953 when he was deported to Macao by British authorities. In 1954 he returned to Hong Kong. In 1958 he went to sea under seaman's papers issued by Hong Kong authorities. His wife and four children live in Macao.

On or about September 30, 1962 Wing Wa Lee entered the United States as a crewman, being authorized to stay so long as his vessel remained in port, but in no event more than 29 days. He did not depart

with his ship but remained in this country. Deportation proceedings were begun against him on April 5, 1963, and he was ordered deported to the Republic of China (Formosa) or Macao. Neither government was willing to accept him, so on May 19, 1965 he was ordered deported to Hong Kong.

On October 3, 1965 the Immigration and Nationality Act was amended by Pub. L. 89-236, 79 Stat. 911 (1965). Of particular interest is the new section 203(a)(7) (8 U.S.C. § 1153(a)(1)) which provides, inter alia, that refugees from Communism shall have a preference in the form of conditional entries into the United States. The section ends with the provision:

> "*Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."[1]

Petitioner Wing Wa Lee wants to bring himself within the refugee provisions of section 203(a)(7). Since he has been in this country for more than two years, he would like to obtain an immigrant visa under the proviso just quoted. In order to do so, he attempted to make an application for adjustment of

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[1] Apparently the difference between an immigrant visa and a conditional entry is that if the alien is found undesirable he can be "excluded" under a conditional entry but must be "deported" under an immigrant visa. The difference is not relevant to our disposition of this case.

status, and moved that the proceedings be reopened for that purpose. The petition was denied, and Wing Wa Lee has petitioned for review of that denial. We have jurisdiction under 8 U.S.C. § 1105a. See *Giova v. Rosenberg,* 379 U.S. 18 (1964), *reversing* 308 F.2d 347 (9th Cir. 1962).

Wing Wa Lee contends that he has the right to file an application for adjustment of status under section 203(a)(7). The government contends that the application for adjustment of status must be filed under section 245 (8 U.S.C. § 1255), which specifically excludes from such consideration aliens who entered the country as crewmen. The parties ask us to decide whether the adjustment of status referred to in section 203(a)(7) is necessarily the procedure of section 245. The facts of this case do not require us to decide this particular question, so we decline to express any opinion on it.

Section 203(a)(7) does not create any new procedure for adjustment of status; it merely refers to the application for such adjustment as a reference point for determining the period of presence in the United States. Congress has been both very careful and very specific in authorizing the Attorney General to adjust the status of aliens. Note the rigid limitations of sections 244 (8 U.S.C. § 1254), 245 (8 U.S.C. § 1255), 247 (8 U.S.C. § 1257), and 249 (8 U.S.C. § 1259).[2] It is clear that in section 203(a)(7) Congress was

[2]Petitioner argues that section 249 is an adjustment of status provision, though not so entitled. For the disposition of this case we can assume, for the sake of argument, that section 249 is such a provision.

providing for the immigration of refugees and not defining any new method of adjustment of status. There is no language in section 203(a)(7) which authorizes the Attorney General to adjust any alien's status. Adjustment provisions must be found somewhere other than section 203(a)(7).

The government argues that the reference of section 203(a)(7) to adjustment of status is exclusively to the procedure and requirements of section 245.[3] As mentioned above, we find it unnecessary to consider whether section 245 is the exclusive method of adjustment of status within section 203(a)(7). But see *Tai Mui v. Esperdy,* 371 F.2d 772 (2d Cir. 1966) (petition for *certiorari* pending). It is unnecessary because petitioner cannot bring himself within *any* adjustment of status provision: (1) he has not been physically present in the United States for seven years, nor has he served in the Armed Forces of the United States, so section 244 does not apply; (2) he is an alien crewman, so his status cannot be adjusted under section 245; (3) he is not an alien lawfully admitted for permanent residence, so section 247 does not apply; and (4) he did not enter the United States prior to June 30, 1948, so section 249 does not apply.

Petitioner's motion to reopen was denied on the ground that he was barred under section 245 from having his status adjusted. While we do not decide

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[3]We note, as did the government, the legislative history of the 1965 amendment to section 203(a)(7) with its statement: "It is contemplated that such adjustments will be made under section 245 of the Immigration and Nationality Act." S. Rep. No. 748, 89th Cong., 1st Sess. (1965).

that section 245 is necessarily the only adjustment of status provision within the meaning of section 203 (a)(7), since we have found that petitioner's status cannot be adjusted under any provision of the Immigration and Nationality Act, the denial of the motion to reopen will be affirmed.

Affirmed.

Appendix B

Form Approved
Budget Bureau No. 43-R400.2

APPLICATION FOR STATUS AS PERMANENT RESIDENT

(For use under Section 245, 249 or the proviso to Section 203(a)(7) of the Immigration and Nationality Act or Section 13 of the Act of September 11, 1957)

FEE STAMP	FILE NO.
	APPLICANT FOR BENEFITS OF SECTION LAW

_____ (Type) Immigrant / Nonimmigrant

visa issued at _____ on _____

(DO NOT WRITE ABOVE THIS LINE) (SEE INSTRUCTIONS BEFORE FILLING IN APPLICATION. IF YOU NEED MORE SPACE TO ANSWER FULLY ANY QUESTION ON THIS FORM, USE A SEPARATE SHEET AND IDENTIFY EACH ANSWER WITH THE NUMBER OF THE CORRESPONDING QUESTION. FILL IN WITH TYPEWRITER OR PRINT IN BLOCK LETTERS IN INK.)

1. I hereby apply for the status of a lawful permanent resident alien on the following basis: (Check appropriate box)
An immigrant visa is immediately available to me: A. ☐ other than as a refugee B. ☐ as a refugee
I have resided in the United States continuously since C. ☐ prior to June 30, 1948 D. ☐ prior to July 1, 1924.

2. My name is (First) (Middle) (Last) | My alien registration number is

I have also used the following names (Married women must show maiden name and names by prior marriages, if any)

3. I reside in the United States at: (Apt. No.) (No. and Street) (City) (State)

4. Date of Birth | Place of Birth (City or Town) (County, Province, or State) (Country) | I am now a citizen of (Country)

5. Height ft. in.	Weight lbs.	Eyes	Hair	Complexion	Marks or Scars	6. Parents' Names

7. I last arrived in the United States at the port of (City and State) on (Month) (Day) (Year)

by (Name of vessel or other means of travel) | as a (Visitor, student, U.S. citizen, stowaway, immigrant, etc.)

8. I have resided at the following places: (Applicants who check Block A or B of Item 1 must furnish all places of residence from date five years prior to entry into the United States, up to and including the present time, listing present address first. Applicants who check Block C or D of Item 1 must show all places of residence during the last five years, listing present address first.)

Street and No.	City	State Province	Country	From Month	From Year	To Month	To Year
						Present time	

9. I have been employed at the following places during the past five years (include all United States and foreign employment)

Full name and address of employer	Type of work I did	From Month	From Year	To Month	To Year
				Present time	

10. I ☐ do ☐ do not intend to seek gainful employment in the United States.

11. I ☐ am ☐ am not married. *(If you are married give the following:)*

a. Date of marriage | b. Date and place of birth of spouse

c. Name of spouse and last address at which you and your spouse resided together
Name Address (Apt. No.) (Number and Street) (Town or City) (State) From (Month and Year) To (Month and Year)

d. Number of times I have been married, including this marriage | e. Number of times my spouse has been married | f. Number of children

g. The following members of my family are also applying for status as permanent residents:

h. Name, date and place of birth and present address of each child:

12. I list below all organizations, societies, clubs, and associations, past or present, in which I have held membership in the United States or a foreign country, and the periods and places of such membership. *(If you have never been a member of any organization, state "None.")*

13. I ☐ have ☐ have not been charged with a violation of law *(other than minor traffic violations)*. *(If you have ever been charged with a violation of law, give date and place and nature of each charge and the final result.)*

14. I ☐ have ☐ have not requested exemption or discharge from training or service in the Armed Forces of the United States. *(If you have ever requested exemption or discharge from training or service in the Armed Forces of the United States, give date and place of your request, the reason for such request, and specify to whom it was made.)*

15. Deportation proceedings ☐ have ☐ have not been instituted against me in the United States. *(If deportation proceedings have ever been instituted against you, give the date and place of hearing, the charge, and the final result.)*

16. I ☐ have ☐ have not been a participant in a designated exchange program. *(If you have been a participant, show dates of arrival and departure from U.S.*

17. *(If you have checked Block A or B of Item 1, complete this item.)* An immigrant visa is now available to me because:
☐ a. I registered on the consular waiting list at the American Consulate at _____ (City) on _____ (Date)
☐ b. A visa petition according me immediate relative / preference status was approved by the district director at _____ (Place) on _____ (Date)
☐ c. A visa petition has not been approved in my behalf but I claim eligibility for immediate relative or preference status because ☐ my spouse ☐ my parent is the beneficiary of a visa petition approved by the district director at _____ (City) on _____ (Date)
☐ d. Other *(explain)*

18. *(If you have checked Block B of Item 1, complete this item.)* A. I ☐ have ☐ have not been absent from the United States during the past two years. *(If you have been absent, attach a separate statement listing the port, date and means of each departure from and return to the United States.)* B. The country from which I fled or the place from which I have been uprooted is
C. The reasons I left and the reasons I am unable or unwilling to return to that country or place are

19. *(If you have checked Block C or D of Item 1, complete this item.)*
A. I first arrived in the United States at _____ (Port) on _____ (Date) by means of _____ (Name of ship or mode of travel) I was / was not inspected by an immigration officer.
B. I entered the United States under the name _____ (Name at time of entry) and I was destined to _____ (City and State) I was coming to join _____ (Name and relationship)
C. Since my first entry I have / have not been absent from the United States. *(If you have been absent, attach a separate statement listing the port, date and means of each departure from and return to the United States.)*

20. I ☐ have ☐ have not heretofore filed an application for the status of a permanent resident. *(If you have ever filed such application, give the date and place of filing and final disposition.)*

21. IF YOUR NATIVE ALPHABET IS IN OTHER THAN ROMAN LETTERS, WRITE YOUR NAME IN YOUR NATIVE ALPHABET BELOW:	Signature of Applicant: Date of Signature:
22. (Signature of person preparing form, if other than applicant.) I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge. Date:	Address of person preparing form, if other than applicant Occupation:

(Application not to be signed below until applicant appears before an officer of the Immigration and Naturalization Service for examination)

I, _____, do swear (affirm) that I know the contents of this application subscribed by me including the attached documents, that the same are true to the best of my knowledge, and that corrections numbered ( ) to ( ) were made by me or at my request, and that this application was signed by me with my full, true name:

_____ (Complete and true signature of applicant)

Subscribed and sworn to before me by the above-named applicant at _____ on _____ (Month) (Day) (Year)

_____ — _____ (gnature and title of officer)